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Attorneys for Defendant and Counterclaim Plaintiff
 KEATING DENTAL ARTS, INC.

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL
 CERAMICS, INC., DBA
 GLIDEWELL LABORATORIES,
 a California corporation,

Plaintiff,

vs.

KEATING DENTAL ARTS, INC.,
 a California corporation,

Defendants.

KEATING DENTAL ARTS, INC.
 a California corporation,

Plaintiff,

vs.

JAMES R. GLIDEWELL DENTAL
 CERAMICS, INC., DBA
 GLIDEWELL LABORATORIES,
 a California corporation, and
 DOES 1 THROUGH 5, inclusive,

Defendants.

Civil Action No.
 SA-CV-11-01309-DOC(ANx)

**REPLY IN SUPPORT OF
 DEFENDANT KDA'S EX PARTE
 APPLICATION TO
 RESCHEDULE HEARING ON
 MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

**CURRENTLY SCHEDULED
 HEARING DATE:
 Monday, March 5, 2012**

**PROPOSED HEARING DATE:
 Monday, March 26, 2012**

**HEARING TIME:
 8:30 a.m.**

**REPLY IN SUPPORT OF KDA'S EX PARTE APPLICATION TO RESCHEDULE
 HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT**

Civ. Action No. SA-CV-11-01309-DOC(ANx)

1 Defendant Keating Dental Arts, Inc. (“KDA”) has applied ex parte for the
2 Court to postpone the hearing date (and the related briefing schedule) for KDA's
3 pending Motion for Partial Summary Judgment (PSJ).

4 **SUMMARY:**

5 Although the undersigned provides further “substance” below regarding
6 issues raise in the opposition that Glidewell filed last night, the undersigned
7 respectfully submits that the controlling considerations should be the following, to
8 which Glidewell offered NO challenge:

- 9 1. Apparently Glidewell will suffer no prejudice by this 21-day delay (at
10 least Glidewell’s opposition mentions no such prejudice). In fact,
11 Glidewell will have the benefit of yet additional time in which to prepare
12 its Opposition Brief regarding KDA’s Motion for PSJ.
- 13 2. The reason that Glidewell cannot argue that it suffered any prejudice
14 is likely because, on **January 10** (less than one week after the January 4
15 date on which the undersigned had “intended” to file and serve KDA’s
16 Motion for PSJ), the undersigned sent to Glidewell’s counsel an email.
17 In it, the undersigned acknowledged that he was late in filing that motion
18 and, in an effort to mitigate any “damage” caused by that delay, the
19 undersigned not only forwarded a copy of the central caselaw upon
20 which KDA’s Motion for PSJ would be based, but also provided a
21 written summary of the substance of that motion. A copy of that email is
22 included below, in the DETAILS section of this Reply Memorandum.
- 23 3. Glidewell’s requested action (of the Court dismissing KDA’s pending
24 Motion for PSJ) clearly would be detrimental to KDA, when in fact
25 KDA is not at fault for the delayed filing of that motion. If some
26 “punishment” is to be administered by the Court, it should be against the
27 undersigned, not against KDA.

1 4. Glidewell does not assert that the 21-day postponement will be an
2 insufficient amount of time for Glidewell to prepare its Opposition.
3 Indeed, Glidewell has been on notice of the need to prepare its
4 Opposition since at least the Court's Scheduling Conference in mid-
5 December.

6 These and additional details that respond to some of the points that
7 Glidewell did raise are included below, but with all due respect, it appears that the
8 foregoing factors should be the ones of most concern and importance to the
9 Court's decision and its efforts to administer justice fairly.

10 **DETAILS:**

11 In Plaintiff Glidewell's opposition to the proposed 21-day postponement,
12 Glidewell does not present any "substantive" points. Instead, Glidewell's
13 opposition merely casts aspersions on the undersigned (while giving lip service to
14 not doing so).

15 Most importantly, Glidewell's opposition does not provide any rationale for
16 its request that the Court dismiss KDA's pending Motion for PSJ. That dismissal
17 clearly would be detrimental to KDA, when in fact KDA is not at fault. If some
18 "punishment" is to be administered by the Court, it should be against the
19 undersigned, not against KDA.

20 In addition, Glidewell does not provide any indication as to why a 21-day
21 postponement would prejudice Glidewell or its attorney in any manner – they
22 apparently have no scheduling conflicts, and apparently they concede that this
23 delay at this early stage of the litigation will have no negative impact on
24 Glidewell's ability to litigate the matter.

25 Perhaps most notably absent is any assertion that a 21-day postponement
26 will not be sufficient for Glidewell to prepare and file its opposition to KDA's
27 Motion for PSJ.

1 As indicated above, the following email presumably explains why
 2 Glidewell is effectively conceding that Glidewell is not prejudiced by the
 3 proposed 21-day postponement. On January 10 (less than one week after the
 4 date on which the undersigned had “intended” to file and serve KDA’s Motion for
 5 PSJ), the undersigned sent to Glidewell’s counsel the following email. In it, the
 6 undersigned acknowledged that he was late in filing that motion and, in an effort
 7 to mitigate any “damage” caused by that delay, the undersigned not only
 8 forwarded a copy of the central caselaw upon which KDA’s Motion for PSJ would
 9 be based, but also provided a written summary of the substance of that motion:

10 ...I apologize for the slight further delay. In the interim, and especially in case it
 11 may modify your client's position (e.g., in view of our discussion outside of the
 12 courthouse about "iPhone" and hypothetical attempts by Apple to stop
 13 competitors from using the term "Phone" as part of their trademarks), attached is
 14 a copy of a 2002 decision in Microsoft v. Lindows.com (an order dated March 15,
 15 2002). Among other things, the decision confirms some of the points I was trying
 16 to make in our discussion, which will be relevant to the motion for partial
 17 summary judgment.

18 One example seems especially relevant, and seems to parallel your client's
 19 efforts to establish exclusive rights to the term BRUX. Despite Microsoft having
 20 by that time sold 677 million licenses of its WINDOWS products (generating
 21 \$36.5 billion in revenues for Microsoft), Microsoft was held to NOT be likely to
 22 succeed on the merits, because the term WINDOWS was generic. In other
 23 words, even with its MASSIVE marketing efforts and despite its great success
 24 (with WINDOWS being used in more than 90% of the PC market) AND
 25 Microsoft's registration of the term, the Court held that the term (WINDOWS)
 26 was likely generic and therefore available for ALL competitors to use in their
 27 trademarks.

28 Similarly, your client is attempting to exert exclusive rights over BRUX, at least in
 part based on your client's extensive advertising of its BRUXZIR mark. In some
 ways, your client's position is arguably much worse than Microsoft's; at least
 Microsoft had registered the actual generic mark on which it was basing its claim
 (WINDOWS), whereas your client has only adopted and used and registered
 BRUXZIR but insists that its rights include the generic portion of that mark
 (BRUX). Even if your client had registered and was using ONLY the term
 "BRUX", its asserted rights would be subject to the same problems encountered
 by Microsoft. Having instead chosen and used the more complicated mark and
 substantially different mark BRUXZIR, it makes it even more difficult to

1 understand why your client should therefore be entitled to stop competitors from
2 using BRUX (or BRUX derivatives such as BRUXER) in their trademarks.

3 I will be pleasantly surprised if your review of the Microsoft/Lindows decision
4 leads your client to reconsider its position, and absent hearing from you to that
5 effect, I will endeavor to complete and forward to you immediately the First
6 Amended Answer and the Motion for Partial Summary Judgment.

7 Thus, had Glidewell's attorney chosen to do so, he could have easily begun
8 preparing Glidewell's opposition far in advance of receiving the actual documents
9 as were eventually filed by the undersigned. It certainly is possible that
10 Glidewell's attorney did begin preparing Glidewell's opposition on January 10, or
11 even earlier.

12 As for the points that Glidewell did raise in its current opposition to
13 rescheduling, the undersigned KDA attorney provides the following for the
14 Court's consideration:

15 1. In order for KDA's Motion for PSJ to be for partial (rather than
16 complete) summary judgment, the undersigned first needed to prepare
17 and file KDA's First Amended Answer and Counterclaims. Otherwise,
18 were the Court to rule in KDA's favor on KDA's Motion for PSJ, that
19 judgment would effectively resolve the entire case (without KDA being
20 in a position to press KDA's claims against Glidewell for damages,
21 unfair competition, etc.). Thus, it was substantively necessary to first
22 file KDA's First Amended Answer and Counterclaims, before filing
23 KDA's Motion for PSJ.

24 2. Rather than adding to the "suspicion" as to reasons for the delayed
25 filing by the undersigned, preparing and filing KDA's First Amended
26 Answer and Counterclaims was part of the reason FOR the delay.

27 3. Other activity during that "delay" period including negotiating a
28 Stipulated Protective Order, that had to be revised and refiled by Mr.
Tachner after further communications with the undersigned. Again, this

1 effort was one of the many factors in the undersigned's "delay."

2 4. Glidewell does NOT even acknowledge the substantial "advance"
3 notice that Glidewell already had regarding KDA's Motion for PSJ.
4 Among other things, the amount of that notice and the information that
5 WAS provided to Glidewell during the delay was so substantial that it
6 probably explains why Glidewell is not now in a position to assert that
7 Glidewell is suffering any prejudice. Among other things:

8 • During the Court's Scheduling Conference in mid-December,
9 Glidewell's counsel was put on notice of not just the fact of KDA's
10 Motion for PSJ, but the substance of that motion. In requesting that
11 the Court place that Motion for PSJ on the Court's calendar, the
12 undersigned explained in open court, to both the Court and
13 Glidewell's counsel: BRUX and BRUXER are generic terms within
14 the dental profession, and it is unfair for Glidewell to try to stop KDA
15 and other competitors from using those terms as part of their
16 trademarks (the undersigned also mentioned that, based on the
17 volume and strength of the evidence of that genericity, it would be
18 extremely unfair to make KDA litigate the entire matter via the
19 Court's normal litigation schedule).

20 • On that same afternoon, as the attorneys walked out of the courthouse
21 after the Scheduling Conference, Glidewell's counsel received even
22 further "advance" details about KDA's Motion for PSJ. As
23 mentioned in KDA's Memo in Support of KDA's Motion for PSJ
24 (beginning at approximately p. 22, l. 17 of that Memo, for example),
25 the attorneys discussed the "genericity" issue. Glidewell's counsel
26 even suggested that Apple's iPhone trademark would be analogous to
27 Glidewell's BruxZir trademark (prompting the undersigned to include
28

the iPhone concept within KDA's Memo in Support, as it IS analogous, but in favor of KDA instead of Glidewell).

- Subsequently, being mindful of the delay as it was unfolding, the undersigned gave further advance "notice" and details to Glidewell's counsel, including at least the following two examples.

- A January 30 email (that the undersigned sent to Glidewell's counsel in between the two water main breaks), stating:

Leonard, On top of Friday's broken water main (which we finally got repaired with a temporary patch), I have been fighting the flu. Regardless, I wanted to get to you at least something, so attached is a DRAFT First Amended Answer, etc. Flu permitting, I expect to finish and file this tomorrow morning, and hopefully there will not be too many (or any) changes from the attached.

I hope this helps demonstrate my continuing good faith efforts to get this and the Motion for Partial Summary Judgment to you, and that I can complete and forward to you that motion later tomorrow.

- In a February 7 email, nearly a week before finally filing KDA's Motion for PSJ, the undersigned again acknowledged the unintended delay in filing, and forwarded to Glidewell's counsel drafts of all but one of the documents for KDA's Motion for PSJ:

Leonard, Attached are all but ONE of the docs we will be filing tomorrow as KDA's Motion for Partial Summary Judgment. I expect to complete and serve on you the final one (the Memo in Support) by around mid-day tomorrow.

One problem we have been trying to resolve is the substantial size of some of the exhibits. In total, there are Exhibits A-G to the Adnan Declaration. I will try to transmit them in chunks of less than 20 MB. If that does not work or if you have some other approach you prefer (e.g., I can post them to a "large file sharing site" from which you can download them), please advise.

I apologize for the delay in getting these materials to you, but I continue to hope and believe that the case law and summaries I did email to you were consistent with the attached and were sufficient to provide you some opportunity to put together your client's response filing.

1 Please advise if you want or need to take some other approach. Absent hearing
2 from you, I will proceed as indicated above.

3 Further regarding the "credibility" of the undersigned, the undersigned will
4 be glad to provide to the Court and opposing counsel the plumber's bill for the
5 work performed replacing the water main, and even a statement from the plumbers
6 confirming that they repaired it twice, on consecutive Saturdays.

7 Finally, the undersigned hopes and presumes that the Court (if not opposing
8 counsel) can understand the undersigned's hesitancy about including this in the
9 undersigned's original ex parte application: the undersigned's wife has filed for
10 divorce, and the Christmas and New Year's holidays and the weeks following
11 were complicated by issues related to that unpleasant reality.

12 In any case, if KDA's Motion for PSJ is NOT heard "soon", KDA will be
13 looking to recover from Glidewell all of its attorney fees and costs occasioned by
14 that delay, on the basis that Glidewell is litigating this matter without a good faith
15 basis in law or fact.

16 I declare, under penalty of perjury under the laws of the United States of
17 America, that the foregoing is true and correct.

18 Signed at Newport Beach, California on February 16, 2012.

19 Dated: 2012-02-16

/J. Mark Holland/

J. Mark Holland

J. MARK HOLLAND & ASSOCIATES
Attorney for Defendant and Counterclaim-
Plaintiff KEATING DENTAL ARTS, INC.,
a California corporation

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23 Related\KDA_Ex_Parte_Appl_to_Reschedule_Hearing_on_Motion_for_Psj\Motion_REPLY_MEMO_to_Resch_Mot_on_Psj_Glidewell_v_Keating_Dental.doc